UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of PRIVATE FUEL STORAGE L.L.C. Independent Spent Fuel Storage Installation	Docket No. 72-22-ISFSI

CLI-01-01

MEMORANDUM AND ORDER

Utah has petitioned the Commission for partial interlocutory review of LBP-00-28, which denied the state's request to admit late-filed contentions Utah LL through Utah OO.[1] All the disputed contentions deal with alleged shortcomings of the NRC staff's June 2000 Draft Environmental Impact Statement (DEIS).

Contemporaneously with filing its petition for review, Utah filed a Motion for Reconsideration with the Atomic Safety and Licensing Board. When a petition for review is filed with the Commission at the same time as a motion for reconsideration is filed with the Board, the Commission will delay considering the petition for review until after the Board has ruled. See International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997). The Board denied reconsideration on November 28, 2000, in LBP-00-31. The petition for Commission review is therefore ripe for our consideration. See 10 C.F.R. §2.786(b).

I. Background

In 1998, the Board established a case-specific time line that required Utah to submit any late contentions concerning the DEIS within 30 days after the staff provided the state with a copy. See Memorandum and Order, June 28, 1998 (unpublished). The Board also ordered the staff to give Utah 15 days' prior notice of the DEIS's release so the state could have its experts ready to review the document and formulate any contentions thereon. The Board reminded the parties of these deadlines in March of 2000 -- less than four months before the staff released the DEIS. See LBP-00-7, 51 NRC 139, 143 n. 1 (2000).

The NRC staff notified Utah on June 9, 2000 that it was about to issue the DEIS and provided the state with a copy on June 19, 2000. Utah submitted a request to admit late-filed Contention KK on July 27.[2] Utah submitted its request to admit Contention Utah LL through OO on August 2, 2000. Utah's August 2 contentions concerned the DEIS's discussion of transportation-related environmental effects of the proposed PFS facility.

The Board found that, because its order gave Utah 15 days' notice to arrange for an expert's review, the 30-day period began to run 15 days after the staff notified Utah of the DEIS's imminent release. The Board determined the deadline expired on July 27, 2000 -- 39 days after the state was given a copy. Because Utah's August 2 filing missed the deadline by six days, the Board concluded that the state did not have "good cause," as that term is used in NRC regulations, for filing the contentions late. See 10 C.F.R. §2.714(a)(1)(i). It rejected Utah's arguments that the state was not aware that the 30 day time period was intended to be a "hard and fast" deadline, and that the state's other litigation burdens associated with this case (including the hearing that was taking place at the time when the clock started ticking) kept it from meeting that deadline. The Board then considered the remaining four factors that NRC regulations provide must be considered in deciding whether to admit late-filed contentions. See 10 C.F.R. §2.714(a)(1)(ii)-(iv). The Board found that, although the other factors favored accepting the late contentions, they were not sufficiently "compelling" to overcome the lack of good cause. The Board also indicated that if it were to consider the substantive admissibility of the proffered contentions, it would deny all but one subpart of Utah's proposed Contention MM. See LBP-00-28, 52 NRC at __, slip op. at 15, n.3.[3]

II. Discussion

Utah has asked the Commission to review the Board's ruling rejecting as impermissibly late Contentions LL, MM, and parts of Contention Utah NN.[4] Utah argues that the Board's ruling rejected the state's DEIS-related contentions not on their merits, but because they were submitted six days late. Utah claims that the Board's ruling will have a "pervasive or unusual" effect on the proceedings below because it essentially destroys the state's right to question the central environmental document in this proceeding. See 10 C.F.R. §2.786(g) (Commission will entertain interlocutory appeals of Board orders that affect the "basic structure" of the proceeding in a "pervasive or unusual manner"). Utah argues that by refusing to admit for hearing these environmental contentions, the Board has done violence to the state's rights under the National Environmental Policy Act to participate in this proceeding.

Utah also advances two additional arguments under the rubric of a "pervasive or unusual" effect. Utah argues that the ruling incorrectly interprets relevant Commission guidance as requiring the Board to impose the "strongest possible sanctions" for a missed deadline "without regard to the harm caused by the infraction, the offending party's conduct in the past, or the context" of the missed deadline. See State of Utah's Partial Interlocutory Appeal of LBP-00-28, p. 2, referring to Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998). Finally, Utah claims that the Board's decision "casts the State as a party that scoffs at or cavalierly ignores Board deadlines and therefore deserves the sternest punishment." Utah fears that the Board's ruling will have a pervasive effect on the proceedings if, in the future, the Board holds this missed deadline against the state as evidence of dilatory behavior or bad faith.

A. Standards for Interlocutory Review

Commission practice generally disfavors interlocutory review, recognizing an exception where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a "pervasive or unusual" effect on the proceedings below. See 10 C.F.R. § 2.786(g); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77 (2000); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

Review under the second criterion of §2.786(g), where there is a pervasive or unusual effect, is granted only in extraordinary circumstances. We have repeatedly held that refusal to admit a contention, where the intervenor's other contentions remain in litigation, does not constitute a pervasive effect on the litigation calling for interlocutory review. See, e.g., Private Fuel Storage, CLI-00-2, 51 NRC at 79-80. The possibility that an interlocutory ruling may be wrong does not in itself justify interlocutory review. See Sequoyah Fuels and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994). Incorrect interlocutory rulings may be reviewed, if necessary, on appeals from partial initial decisions or other final appealable orders. See Private Fuel Storage, CLI-00-2, 51 NRC at 80. In this instance, however, the Board's ruling ostensibly sweeps away an entire class of contentions, not on their merits, but because of the intervenor's untimely filing. We will, therefore, examine more closely Utah's arguments that the ruling will have a pervasive or unusual effect on this litigation.

B. Pervasive or unusual Effect

1. National Environmental Policy Act

Utah argues that the denial of its contentions on the DEIS impairs its rights under NEPA, constituting a pervasive or unusual effect on the proceedings below. We do not agree that the Board's ruling impairs the state's rights under NEPA. The right of interested persons to intervene as a party in a licensing proceeding stems from the Atomic Energy Act, not from NEPA. See AEA §189, 42 U.S.C. §2239(a)(1)(A). Commission regulations promulgated under NEPA give the state such rights as the opportunity to participate in the scoping process for the environmental impact statement, and to receive copies and to comment on the DEIS. See 10 C.F.R. §51.28, §51.73, §51.74; see generally 10 C.F.R. Part 51. Utah has not shown how these participatory rights were impaired by the Board's refusal to admit the DEIS related contentions. Moreover, at the outset of this case, the Board admitted a number of Utah's NEPA contentions (based on the applicant's environmental report) and these remain available for litigation. See LBP-98-7, 47 NRC 142, 199-206 (1998).

2. Interpretation of Policy on Conduct of Adjudicatory Proceedings

Utah argues that the Board misinterpreted our directive in our Statement of Policy on the Conduct of Adjudicatory Proceedings regarding setting schedules and the parties' obligations to meet those schedules. See 48 NRC at 20-21. The Board summarized this policy as showing that the Commission expects that "the presiding officer will set schedules, that parties will adhere to those schedules, and that presiding officers will enforce compliance with those schedules." See LBP-00-28, 52 NRC at __, slip op. at 11.

Utah complains that the Board interpreted this policy as calling for the harshest sanction - rejection of the late-filed contention -- as a means to enforce the deadlines. The state claims that this interpretation ignores longstanding agency practice (outlined in an earlier policy statement) that, in deciding what sanction to impose, the Board should consider "the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceedings, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety

or environmental concerns raised by the party, and all of the circumstances." See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

It is true that nothing in our 1998 Statement of Policy overrides the 1981 Statement of Policy with respect to assessing sanctions against a recalcitrant party. However, the Board's order did not impose the harshest conceivable sanction (which would be dismissal of the offending party for procedural defaults), nor did it deny the contention merely on the basis of the missed deadline. Rather, after determining that there was no good cause for missing the deadline, the Board weighed the other factors and found that, on the balance, admission was not favored. Failure to meet the late-filed standards does not, under NRC rules, leave the Board free to impose an array of sanctions of varying severity. On the contrary, the rules specify that impermissibly late contentions "will not be entertained." See 10 C.F.R. §2.714(a)(1).

Further, even if the Board did misconstrue the 1998 Statement of Policy, Utah has not shown that its interpretation is so unusual as to potentially reshape the remainder of the proceedings.

3. Characterizing State as a Bad Faith Actor

Utah is also concerned that the Board's ruling will have a pervasive effect on the proceedings by characterizing the state as a bad faith litigant. Licensing Boards have broad discretion to sanction willful, prejudicial and bad faith behavior. 10 C.F.R. §2.707; see, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423 (1988), review denied, CLI-88-11, 28 NRC 603 (1988). If Utah were found to be a party that willfully disregards deadlines to the prejudice of opposing parties, that finding could result in the Board dealing more strictly with the state in the future.

We do not agree, however, that the Board's ruling with respect to the DEIS-related contentions characterizes Utah "as a party that scoffs at or cavalierly ignores" deadlines. In fact, the Board readily acknowledged that the state has "on a continuing basis ... put forth [its] best efforts to meet the timing and other resource challenges involved." See LBP-00-28, 52 NRC at __, slip op. at 12. Although the Board found that Utah had not shown an "appropriate concern" for this particular deadline, nothing in LBP-00-28 indicates that the Board generally regards the state as a dilatory litigant or that the state's failure to meet the deadlines with respect to the DEIS will be used to justify harsh sanctions against the state in the future.

III. Conclusion

We conclude that Utah has not shown that the ruling below will have a pervasive or unusual effect on the remainder of the litigation. Therefore, Utah's request does not meet our standards for interlocutory review, and we deny its petition for interlocutory Commission review.

IT IS SO ORDERED.

For the Commission

/RA/

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
This 10th day of January, 2001

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1. Utah titles its pleading a "Partial Interlocutory Appeal." Our rules, however, provide for no such appeals as of right, and we therefore consider Utah's submission as a petition for interlocutory Commission review.

2. The Board determined that KK was filed within the time period described by its order, but denied the request after considering the other late-filing criteria found at 10 C.F.R. § 2.714(a)(1). See LBP-00-27, 52 NRC __ (2000).

3. That subpart, Utah MM, subpart 3, claimed that "the DEIS underestimates the radiological consequences of a Severity Category 6 accident by underestimating the release fraction for [Chalk River Unidentified Deposits (CRUD)]."

4. The State of Utah's Motion for Partial Reconsideration of LBP-00-28, the substance of which was incorporated by reference in its request for partial interlocutory review, sought reversal only with respect to Contentions LL, MM, and parts of Contention Utah NN. The Board's decision stated that the economic concerns expressed in Contention NN and OO could have been raised when PFS submitted its Environmental Review in 1997, and therefore these concerns were more than two years too late. LBP-00-28, 52 NRC at __, slip op. at 8. Utah has apparently decided not to pursue review of the Board's ruling that the economic concerns in NN and OO were not admissible contentions.